

## CHAPTER 26 COMMAND AUTHORITY

### I. SOURCES OF COMMAND AUTHORITY

#### A. Constitution:

1. Article 1, Section 8: “Congress shall have the power to ... declare war ... raise and support Armies ... make rules for the Government and regulation of the Land and Naval forces ....”
2. Article II, Section 2: “The President shall be Commander in Chief of the Army and Navy of the United States.”

#### B. Statutes, e.g., 10 U.S.C. sections 1071-1104, “under regulations to be prescribed by the Secretary of Defense,” active duty military entitled to medical and dental care in any facility of the uniformed services.

#### C. Regulations:

1. DoD Directives, DoD Instructions
2. Service Regulations:
  - a) Army, AR 600-20 (15 July 1999);
  - b) Navy, Navy Regulations (1990), SECNAVINST, OPNAVINST;
  - c) Air Force, Air Force Instructions (AFI);
  - d) Marines, Marine Corps Orders (MCO)
3. Local regulations, policies, directives.

#### D. Inherent Authority. Recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is “necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand”). See also Greer v. Spock, 424 U.S. 828 (1976)(commander has the “historically unquestioned power” summarily to exclude civilians from the area of his command; “There is nothing in the Constitution that disables a military commander from acting to

avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command”).

II. **DELEGATION OF COMMAND AUTHORITY:** “Any duties of an installation commander may be delegated except those which are imposed upon installation commander by law, such as those mentioned in the Uniform Code of Military Justice, appropriation acts, other statutory provisions and regulations, or other directives that specifically prohibit delegation.” AR 210-10, para 2-5. (Now rescinded) AFI 51-604, Appointment to & Assumption of Command; Navy Reg. Art. 0802.

III. **USE OF COMMAND AUTHORITY TO REGULATE:**

A. Speech

1. Nature of Forum:

- a) Public Forum: Traditionally used for free speech activities, such as public streets and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440 (1995)(state owned plaza surrounding Statehouse in Columbus, Ohio). Test is whether principal purpose is free exchange of ideas, evidenced by long-standing historical practice of permitting speech. But see U.S. v. Kokinda, 497 U.S. 720 (1990)(sidewalk used solely as a passage for postal patrons not a public sidewalk); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)(airport terminals not public forum).
- b) “Created” Public Forum: a.k.a. “limited” or “designated.” Government property set-aside for free speech activities. E.g., Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S.384 (1993)(school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995)(university’s Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications). Intent & extent of use granted is key
- c) Nonpublic Forum. Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as “regulation on speech is reasonable and not an effort to suppress expression merely because public

officials oppose the speaker's view.” Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)(selective access to school mailboxes did not transform property into public forum). See also Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985). Public access such as at open house is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, *supra*; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8<sup>th</sup> Cir. 1982). Contra, U.S. v. Albertini, 710 F.2d 1410 (9<sup>th</sup> Cir. 1983), rev. on other grounds, 472 U.S. 675 (1985).

## 2. Content-based Restriction:

- a) Public Forum: strict scrutiny (necessary to serve a compelling state interest and narrowly drawn to achieve that end).
- b) “Created” Public Forum: same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, *supra* (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb's Chapel v. Center Moriches Union Free School District, *supra* (prohibiting after hours access to school property to groups with religious viewpoints).
- c) Nonpublic Forum: reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate “labor union” and group meetings rationally related to reasonable objectives of prison administration).

3. Unprotected Speech including Dangerous Speech:

- a. Fighting Words, i.e., those “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” Cohen v. California, 403 U.S. 15, 20 (1971)(simply wearing jacket bearing words “F\*\*\* the Draft” may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace;” upheld conviction for calling another “damned racketeer” and “a damned Fascist”).
- b. Pornography. Roth v. U.S., 354 U.S. 476 (1957)(1<sup>st</sup> Amendment does not protect obscenity, i.e., material which deals with sex in a manner appealing to prurient interest).
- c. Dangerous Speech:
  - (1) Civilian Standard: whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969)(mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steeling it to violent action).
  - (2) Military Standard: speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974)(different character of the military community and mission requires different application of 1<sup>st</sup> Amendment protections; “fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it”). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977)(affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1<sup>st</sup> Amendment test in military is that words “tended to interfere with responsiveness to

command or to present a clear danger to military, loyalty, discipline, or morale”).

4. Prior Restraint. DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (1 Oct 96); AR 600-20, Army Command Policy; AFI 51-903, Dissident & Protest Activities; MCO 5370.4A, Dissident & Protest Activities; OPNAVINST 1620.1A, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces.
  - a. Approval in advance to determine whether publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with mission is authorized. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980)(unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).
  - b. Limitations: Cannot pull individual issues of materials distributed through PX or library.

B. Solicitation

1. Charitable. DoDD 5035.1, Fund-Raising Within the Department of Defense; AR 600-29, Fund Raising within the Department of The Army; SECNAVINST 5340.2C, Fundraising & Solicitation of Dept of Navy Military & Civilian Personnel. On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies, e.g., in Army, Army Emergency Relief. Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund raising to assist the unfortunate such as veteran organization “poppies” and collection boxes for food or goods.

2. Commercial. DoDD 1344.7, Personal Commercial Solicitation on DoD Installations; AR 210-7, Commercial Solicitation on Army Installations; SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs.
  3. No right to solicit; must be authorized. Army permits in writing and valid for up to one year. (Navy/MC by local reg). Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas.
  4. Highly regulated to maintain discipline, protect property, and safeguard personnel. List of forbidden practices includes mass solicitation and retirees using IDs to get on post to solicit. Additional requirements for life insurance/securities. Violators can lose solicitation privileges; receive due process in form of notice and opportunity to be heard. Nature varies with service, e.g., Army has “show cause” hearing; Navy/MC informal.
- C. Political Activities: DoDD 5500-7.R, Joint Ethics Regulation; DoDD 1344.10, Activities by Members of the Armed Forces on Active Duty; AR 600-20; MCO 5370.7A, Political Activities; AFI 51-902, Political Activities by Members of the USAF.
1. Soldiers, Sailors, Airmen & Marines: Traditional concept is that military members do not engage in partisan political activity. Examples: Voting and expressing personal opinion on candidates and issues authorized, as are contributions to a political party. Prohibitions include: no public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F.Supp. 915 (D.Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)); no distribution of partisan political literature; no participation in partisan political management, campaigns, or convention.
  2. Civilians: Hatch Act, 5 U.S.C. Sections 7324-27. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than DoD is for military. 1-800-85-HATCH (854-2824)
  3. Recurring Issue: bumper stickers & signs:

- a) Small bumper sticker on private vehicle is authorized; large sign or poster is not.
- b) Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11<sup>th</sup> Cir. 1995)(order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President not violative of 1<sup>st</sup> Amendment).
- c) Lawn Signs in Government housing areas. Local policy usually controls. Appropriate limitations authorized.

#### 4. Extremist Organizations.

- a) See DoDD 1325.6; AR 600-220; AFI 51-903; MCO 5370.4A; OPNAVINST 1620.1A. (Prohibiting active participation in organizations which espouse supremacist causes, attempt to create illegal discrimination, advocate the use of force or violence, or otherwise engage in efforts to deprive others of their civil rights.)
- b) Army: AR 600-20; HQDA Message, DAPE-ZA, dated 20 Dec 96. Subject: Revised Army Policy on Participation in Extremist Organizations or Activities.
  - (1) Participation in extremist organizations or activities is incompatible with military service.
  - (2) Extremism includes advocating racial, gender or ethnic hatred or intolerance.
  - (3) Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline/mission accomplishment; attending meetings under certain circumstances, e.g., in violation of commander's order.
  - (4) Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, morale within the command.

D. Religion

1. Constitutional test. Lemon v. Kurtzman, 403 U.S. 602 (1977)(three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion)

a) Applied:

- (1) Religious displays. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6<sup>th</sup> Cir. 1986)(city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F.Supp. 3 (D.D.C. 1988)(65-ft cross in front of HQ on military installation unconstitutional).
- (2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).
- (3) Invocations. Lee v. Weisman, 505 U.S. 577 (1992)(“nonsectarian” prayer at middle and high school graduation ceremonies impermissible establishment of religion). See also Santa Fe Independent School District v. Jane Doe, 120 S.Ct. 2266
- (4) Day care. Hartmann v. Stone, 68 F.3d 973 (6<sup>th</sup> Cir. 1995)(Army regulations prohibiting Family Child Care providers from having any religious practices during their day-care program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b) Exceptions:

- (1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).
- (2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983). Army

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2. Statutes

- a) Religious Freedom Restoration Act, 42 U.S.C. section 2000bb (Government shall not substantially burden exercise of religion, even from a rule of general applicability, except in furtherance of a compelling governmental interest and through the least restrictive means). Compelling governmental interest test applies to the military, but intent is for courts to grant authorities significant deference in effectuating military interest in maintaining good order, discipline and security. 1993 U.S. Code Cong. & Admin News 1892. RFRA ruled unconstitutional in Boerne v. Flores, 1997 W.L. 34532 (U.S., June 25, 1997)
- b) 10 U.S.C. section 774, legislatively overruling Goldman v. Weinberger, 475 U.S. 503 (1986)(granting great deference to professional judgment of military authorities on matters of military interest and holding that 1<sup>st</sup> Amendment did not prohibit AF regulation preventing wearing of yarmulke while on duty and in uniform). Statute provides for wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty.

3. Regulation & Policy. DoDD 1300.17, Accommodation of Religious Practices Within the Military Services; AR 600-20; SECNAVINST 1730.8, Accommodation of Religious Practices.

- a) Policy is to approve requests for accommodation of religious practices when it will not have an adverse impact on readiness, safety, discipline, etc. Commander responsibility but soldier can have denial reviewed: Army (HQDA Committee for Review of Accommodation of Religious Practices in U.S. Army); Navy/Marine ((for wear & appearance denial) CNO/CMC)
- b) Specific practices:
  - (1) Worship: worship requirements that conflict with normal availability for duty will be accommodated unless precluded by military necessity.

- (2) Dietary: exception to policy to ration separately and take personal supplemental rations in field/combat environment.
- (3) Medical practices: in Army, no accommodation in lifethreatening situations; otherwise, medical board will consider request.
- (4) Wear and appearance: neat and conservative items of religious apparel may be worn except if it would interfere with performance of duty.

**IV. AUTHORITY OFF THE INSTALLATION: THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB).** Joint Reg: AR 190-24/ OPNAVIST 1620.2A/ MCO 1620.2B/ AFI 31-213.

- A. Mission: to make recommendations on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.
- B. Duties: include taking action on reports of negative conditions, liaison with civil authorities, recommendations to commander.
- C. Composition: representatives include law enforcement, legal, health and environment, equal opportunity, and safety.
- D. Sanction: may recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.
- E. Due process provided in form of notice and opportunity to be heard at board.
- F. Loss to business from order is not a “taking” for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4<sup>th</sup> Cir. 1946).
- G. Enforcement: Violation of off-limits is UCMJ offense.

**V. Uses of Command Authority**

- A. Installation Protection
  - 1. Limitations on Access (Bars, 18 USC 1382)
  - 2. Limitations on Use (Facilities, Vehicles on the Installation)
- B. Limits to Individual Conduct

1. Body piercing, tattoos and clothing
  2. Inoculations
- C. Authority Off-Post
1. Inspections
    - (a) Residence
    - (b) Vehicles
  2. Weapons Registration

